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DONNIS JIKUT (TRADING UNDER THE NAME AND STYLE OF PP ENGINEERING) v. BROTHER'S CONSTRUCTION (M) SDN BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
FARIDZ GOHIM ABDULLAH JC
B [CIVIL APPEAL NO: BKI-12BC-1-8-2023]
16 OCTOBER 2023

Abstract – *The rules governing an appeal procedure must be strictly adhered to; failure to comply with mandatory requirements may be fatal to an appeal and would render the same to be struck out. In the filing of a record of appeal, the mandatory provisions under O. 55 r. 4 of the Rules of Court 2012 ('ROC') must be strictly followed. If the party intentionally disregards the compliance with the rules, O. 1A of the ROC could not be invoked to cure the non-compliance.*

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CIVIL PROCEDURE: *Appeal – Procedure – Record of appeal – Requirements under O. 55 r. 4 of Rules of Court 2012 ('ROC') – Whether requirements mandatory – Failure to obtain approval to draft index from opposite party before filing of record of appeal – Whether rendered record of appeal defective and nullity – Whether record of appeal incomplete – Whether record of appeal served out of prescribed time limit – Whether non-compliance with Rules fatal to appeal – Whether curable under O. 1A of ROC*

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The preliminary objection herein was raised by the respondent's solicitor pertaining to the record of appeal filed and served by the appellant's solicitor. The preliminary objection was premised on the ground of failure to comply with the mandatory requirements under O. 55 r. 4(1)(h) and r. 4(8) of the Rules of Court 2012 ('ROC') and therefore, ought to be struck out. The issues for the court's determination were: (i) whether the draft index of documents to be included in the record of appeal complied with O. 55 r. 4(1)(h) of the ROC or otherwise; (ii) the record of appeal did not include all the relevant documentary exhibits and other documents such as the plaintiff's opening statement, the statement of agreed facts, issues for trial, documentary exhibits tendered during the trial; and (iii) the record of appeal was not served on the respondent's solicitor within the time limit for the serving of a copy of such record of appeal.

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Held (allowing preliminary objection; appellant's appeal struck out with no order as to costs):

(1) Order 55 r. 4 of the ROC allows the respondent's solicitor to put forward his objection within 48 hours upon receiving the draft index to the inclusion or exclusion of any document in the draft index. The record of appeal was emailed to the respondent's solicitor on 29 August

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2023 to which the respondent's solicitor replied the next day, stating their objection to the draft index to the record of appeal for non-compliance with O. 55 r. 4 of the ROC. However, the appellant's solicitor proceeded with the filing of the record of appeal on 30 August 2023 without reverting to the respondent for their approval or agreement. It was incumbent upon the appellant's solicitor to secure the approval or agreement to the draft index under O. 55 r. 4(4) for the inclusion or exclusion of all the exhibits and other relevant documents to be incorporated in the appeal records. Such a failure was a breach of the mandatory requirement under O. 55 r. 4(4) of the ROC and may render the record defective and a nullity. Since the record of appeal filed by the appellant's solicitor did not contain all the documents the parties shall consider relevant for the purposes of the appeal, such record was inadequate and failed to adhere to the requirement of O. 55 r. 4(1) of the ROC. (paras 13, 14, 16, 24 & 25)

(2) The appellant's solicitor also failed to take any action, as provided under O. 55 r. 4(5) of the ROC, to refer their disagreement to the Registrar of the High Court. Instead, the appellant's solicitor proceeded to file the record of appeal knowing that there was an objection by the respondent's solicitor towards the draft index of documents to be included in the record of appeal. Thus, it was not an agreed record of appeal for purposes of the appeal before this court. (para 28)

(3) It was the obligation of the appellant's solicitor to ensure that all documents the parties shall consider relevant for the purposes of appeal be included in the record of appeal. However, the record of appeal was already filed on 11 September 2023 when the respondent's second letter dated 12 September 2023 specifying the documents that ought to be included was served on the appellant's solicitor. There was no action taken by the appellant's solicitor to regularise the record of appeal. As such, the record of appeal was an incomplete record being filed in court. (para 33)

(4) The notice of appeal was filed by the appellant's solicitor on 7 August 2023. Reading O. 55 r. 4(1) and r. 4(8) of the ROC together, it was mandatory on the appellant's solicitor to serve the respondent's solicitor with a copy of the record of appeal containing copies of the documents as listed in O. 55 r. 4(1)(a) to (h), latest by 6 September 2023. However, the record of appeal was only served on the respondent's solicitor on 11 September 2023, a delay of approximately five days. No application was filed for extension of time to serve the record of appeal. Therefore, the record of appeal was served out of the time prescribed for the service and could not be allowed to be used for the purposes of the appellant's appeal. (paras 36, 37, 40 & 45)

(5) Order 1A of the ROC could not be invoked when a party intentionally disregards in complying with the rules. The failure on the part of the appellant's solicitor to comply with O. 55 r. 4 was not an accidental omission or oversight. It was intentionally disregarded despite the objection raised by the respondent's solicitor. This non-compliance could not be remedied as it did not fall within the provision of O. 1A of the ROC. (paras 51 & 52)

Case(s) referred to:

Cangkat Jering Sdn Bhd & Satu Lagi lwn. Normayati Alias & Satu Lagi [2003] 2 CLJ 260 HC ***(refd)***

Chuah Tim Lan v. RHB Bank Bhd & Anor [2008] CLJU 422; [2008] 1 LNS 422 CA ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

HH Ideal Sdn Bhd v. Technology Engineering Concept Sdn Bhd [2018] MLJU 1457 ***(refd)***

Maranatha Tours & Travel Sdn Bhd v. Ampang Specialist Centre Sdn Bhd [1997] CLJU 335; [1997] 1 LNS 335 HC ***(refd)***

Mazni Ibrahim v. Rosaidy Effandy (Tetuan Khairil & Co) [2013] 4 CLJ 453 CA ***(refd)***

National Union Of Bank Employees v. Director General Of Trade Unions & Anor [2013] 7 CLJ 957 FC ***(refd)***

Tan Chai Huat v. Yap Tian Leong [2018] CLJU 423; [2018] 1 LNS 423 HC ***(refd)***

Tang Hooi Kheng v. Titular Roman Catholic Bishop Of Penang [2018] CLJU 233; [2018] 1 LNS 233 HC ***(refd)***

Legislation referred to:

Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994, rr. 4, 5

Rules of Court 2012, O. 1A, O. 55 r. 4(1)(a), (b), (c), (d), (e), (f), (g), (h), (3), (4), (5), (8)

For the plaintiff - Chen Wen Jye; M/s Ram Singh Harbans & Co
For the defendant - Song Wei Wan; M/s Korventt & Song

Reported by S Barathi

JUDGMENT

Faridz Gohim Abdullah JC:

Introduction

[1] On 26 September 2023, I delivered my brief ruling pertaining to the preliminary objection by the respondent's solicitor against the appellant's record of appeal for non-compliance with O. 55 r. 4 of the Rules of Court 2012 whereby I allowed the said preliminary objection and ordered for the appellant's appeal be struck out with no order as to costs.

[2] Dissatisfied with my decision, the appellant filed a notice of appeal dated 4 October 2023 against the whole of my decision.

[3] I now give my grounds for the said decision.

Background Of Preliminary Objection

[4] On September 2023, the respondent's solicitor raised a preliminary objection pertaining to the record of appeal that was filed and served by the appellant's solicitor.

[5] The preliminary objection was premised on the grounds that the record of appeal filed by the appellant's solicitor failed to comply with the mandatory requirements stipulated under O. 55 r. 4(1)(h) and r. 4(8) of the Rules of Court 2012 (ROC) and ought to be struck out.

The Appellant's Documents

[6] The following are the documents that were filed by the appellant's solicitor pertaining to his appeal against the decision of the learned Sessions Court Judge of Kota Kinabalu.

(i) notice of appeal (encl. 1) filed on 7 August 2023.

(ii) record of appeal (encl. 2) filed on 30 August 2023 consisting of vol. 1 to vol. 6.

The Law On Filing An Appeal

[7] The law pertaining to an appeal from a decision after trial is stipulated in O. 55 r. 4 of the ROC 2012 as follows:

> Record of appeal (O. 55 r. 4)
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> (1) In the case of an appeal from a decision after trial, the appellant shall within one month from the date of filing of the notice of appeal prepare and file the requisite number of copies of the record of appeal in the High Court and the record shall contain copies of:
>
> (a) the relevant pleadings;
>
> (b) the notes of evidence, including witness statements, if available, recorded wholly or partly by mechanical means;
>
> (c) the grounds of judgement, if available;
>
> (d) the memorandum of appeal;
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> (e) the decision, order or judgment;
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> (f) a duplicate copy of the notice of appeal;
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> (g) a duplicate copy of the notice of cross appeal, if any;
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> (h) all such documentary exhibits and other documents the parties shall consider relevant for the purpose of the appeal.
>
> Provided that the record of appeal shall be filed notwithstanding that the notes of evidence and/or grounds of judgement are not ready;
>
> (2) ...

A (3) ...

(4) A draft index of the documents to be included in the record of appeal shall be sent by the solicitors for the appellant to the solicitors for the respondent who or, if more than one, any one of whom may, within forty-eight hours, object to the inclusion or exclusion of any document.

B (5) In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the High Court who may require the parties to attend before a Judge of the High Court.

(6) ...

C (7) ...

(8) The appellant shall within the time limited for the filing of a record of appeal serve each respondent with a copy of such record of appeal.

[8] Based on the oral submission and argument by both parties, the issues for determination by this court can be summarised as follows:

D (i) whether the draft index of documents to be included in the record of appeal complies with O. 55 r. 4(1)(h) of the ROC 2012 or otherwise.

(ii) that the record of appeal (ROA) does not include all the relevant documentary exhibits and other documents such as the plaintiff's opening statement, the statement of agreed facts, issues for trial, and E documentary exhibits tendered during the trial.

(iii) that the ROA was not served on the respondent's solicitor within the time limit for the serving of a copy of such record of appeal on the respondent's solicitor.

F **[9]** I shall now deal with each and every of the above issues accordingly.

[10] On issue (a) that the draft index of documents to be included in the record of appeal shall comply with O. 55 r. 4(1)(h) of the ROC 2012.

For ease of reference, O. 55 r. 4(1)(h) is reproduced below:

G *(1) In the case of an appeal from a decision after trial, the appellant shall within one month from the date of filing of the notice of appeal prepare and file the requisite number of copies of the record of appeal in the High Court and the record shall contain copies of:*

(a) to (g) ...

H *(h) all such documentary exhibits and other documents the parties shall consider relevant for the purpose of the appeal.*

(emphasis added)

[11] It is clear under O. 55 r. 4(4) of the ROC 2012 that a draft index of I documents to be included in the record of appeal shall be sent by the solicitor for the appellant to the solicitor for the respondent who may, within 48 hours, object to the inclusion or exclusion of any document.

[12] Order 55 r. 4(4) of the ROC 2012 says:

> A draft index of the documents to be included in the record of appeal **shall be sent** by the solicitors for the appellant to the solicitors for the respondent who or, if more than one, any one of whom **may, within 48 hours, object** to the **inclusion or exclusion of any document**.
>
> (emphasis added)

[13] This provision allows for the respondent's solicitor to put forward his objection within 48 hours upon receiving the said draft index to the inclusion or exclusion of any document in the draft index. By using the word "shall be sent", it is mandatory on the appellant's solicitor to send the draft index of the documents to be included in the record of appeal to the solicitor for the respondent.

[14] According to the respondent's solicitor, the draft index to the record of appeal was emailed to them on 29 August 2023. The respondent's solicitor then replied to the said email the next day, stating their objection to the draft index to the record of appeal for non-compliance with O. 55 r. 4 of the ROC 2012.

[15] Enclosure 4 is the letter from the respondent's solicitor dated 30 August 2023 informing the appellant's solicitor of their objection to the draft index to the record of appeal filed by the appellant's solicitor.

I reproduced part of the content of the said letter as follows:

> We refer to your letter dated 29 August 2023 together with the Draft record of appeal which was emailed to us yesterday afternoon.
>
> We hereby write to inform that we are objecting to the Draft record of appeal in view that it does not include all the necessary and relevant documents and exhibits and therefore does not comply with Order 55 rule 4(1) of the Rules of Court 2012.

[16] The appellant's solicitor, however, decided to proceed with the filing of the record of appeal on 30 August 2023 without reverting back to the respondent's solicitor for their approval or agreement before filing the said record of appeal though they have been notified by the respondent's solicitor of their objection.

[17] The respondent's solicitor referred this court to the case of *HH Ideal Sdn Bhd v. Technology Engineering Concept Sdn Bhd* [2018] MLJU 1457 that the word "shall" means that it is a mandatory requirement and is not curable by any provisions stated in the Rules of Court 2012.

[18] The court in *HH Ideal Sdn Bhd*'s case had referred to another case of *Mazni Ibrahim v. Rosaidy Effandy (Tetuan Khairil & Co)* [2013] 4 CLJ 452.

[19] In the case of *Mazni Ibrahim* (*supra*) above, a preliminary objection was raised on the grounds of non-compliance with rr. 4 and 5 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994, thereby

A rendering the motion defective and incompetent. The High Court dismissed the motion. The Court of Appeal examined the grounds of judgment. Paragraphs 3, 4, 5 and 6 of the grounds of judgment of the High Court show that the dismissal was upon the preliminary objection because the applicant had not only failed to file an appeal record within the time allowed by the B Rules but also failed to file any record of appeal and to serve the same on the respondent, the Disciplinary Board and the Bar Council. There was also no application to file the record of appeal out of time and there was no explanation given for non-compliance with rr. 4 and 5.

[20] The Court of Appeal explained as follows:

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> The failure to serve the draft record of appeal upon the respondent before it was filed was a fundamental threat to the reliability of the record of appeal before the appellate courts. Without the record of appeal filed, the appeal was fundamentally defective. In the present case, the record of appeal filed in the High Court was incomplete, while the record of appeal D in the present appeal suffered from the fundamental defect of the draft not having been served upon the respondent and containing a submission which the latter denied making. Hence, it was not made possible to show where the merits and justice lay.
>
> Such failure is a fundamental threat to the reliability of records of appeals before the appellate courts that it cannot be countenanced under any E circumstances. Such defect is, therefore, fatal to the record of appeal. Without a record of appeal filed, the appeal is fundamentally defective.

[21] The appellant in that case also failed to include relevant documents that parties referred during the full trial, which tantamount to a serious act of non-compliance to the mandatory requirement and is fatal and cannot be F remedied by any other provision of the Rules of Court. The general provision such as O. 1A of the Rules of Court cannot be invoked.

[22] I am of the view that, in objecting to the inclusion or exclusion of any document, the objection must be specific pertaining to which document intended by the respondent's solicitor to be included or excluded and shall G not simply informing their objection in general and hoping for the appellant's solicitor to know which document is meant by the respondent's solicitor. This is evident from the respondent's solicitor's letter dated 30 August 2023 where no specific document or exhibits was mentioned by the respondent's solicitor in the said letter. H

[23] Be that as it may, it is still the appellant's solicitor's responsibility to ensure that their record of appeal complies with all the requirements of the Rules pertaining to their appeal, in particular O. 55 r. 4(4) of the ROC 2012. The appellant's solicitor here had failed to obtain the approval or agreement I of the respondent's solicitor with regards to the said draft index before the record of appeal was filed in court.

[24] This provision is a mandatory requirement upon the solicitor for the appellant to comply. It is incumbent upon them to secure the approval or agreement to the draft index under O. 55 r. 4(4) of the ROC 2012 for the inclusion or exclusion of all the exhibits and other relevant documents to be incorporated in the appeal records, which must be filed within one month from the date of the notice of appeal. Therefore, such failure is a breach of the mandatory requirement under O. 55 r. 4(4) of the ROC 2012 and may render the record defective and a nullity.

[25] The principles in the case of *Chuah Tim Lan v. RHB Bank Bhd & Anor* [2008] CLJU 422; [2008] LNS 422; [2008] 6 MLJ 793 at p. 794, para. (2) is relevant and applicable to this appeal where His Lordship Suriyadi JCA states as follows:

> Even though the physical documents were filed and declared as record of appeal by the applicant, the contents were inadequate and had failed to adhere to the requirements of the Rules and Practice Directions. The record of appeal lacked a memorandum of appeal. Rule 18(1) states the requirement and the significance of this requirement was obvious. Rule 18(7) of the Rules states that to qualify as a record of appeal, it shall comprise the memorandum of appeal and copies of certain documents of the proceedings in the High Court, as enumerated in r 18(4). That record of appeal shall thereafter be filed at the Registry within eight weeks after entry of the appeal. It is from this document that any respondent or court will know what the appeal was all about (see paras 9-10).

Since the record of appeal filed by the appellant's solicitor did not contain all the documents the parties shall consider relevant for the purposes of the appeal, such record is inadequate and failed to adhere to the requirement of O. 55 r. 4(1) of the ROC 2012.

Order 55 Rule 4(5) Of The ROC 2012

[26] In cases whereby the parties could not achieve an agreement, the matter shall be referred to the Registrar of the High Court, who may require the parties to attend before a judge of the High Court. This procedure was clearly stated under O. 55 r. 4(5) as follows:

> Order 55 r. 4(5) of ROC 2012:
>
> (5) In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the High Court ...

[27] In the present appeal, as a matter of procedure, the appellant's solicitor should have referred their dispute to the Registrar of the High Court as they have been informed by the respondent's solicitor of the objection to the draft index to the record of appeal. The appellant's solicitor did not inform this court that they have taken such step.

[28] The appellant's solicitor failed to take any action as provided under O. 55 r. 4(5) of the ROC 2012 to refer their disagreement to the Registrar of the High Court. Instead, the appellant's solicitor proceeded to file the record of appeal knowingly that there is an objection by the respondent's solicitor towards the draft index of documents to be included in the record of appeal. Thus, the record of appeal that was filed by the appellant's solicitor is not an agreed record of appeal for purposes of the appeal before this court.

[29] Issue (ii): That the record of appeal (ROA) does not include all the relevant documentary exhibits and other documents such as the plaintiff's opening statement, the statement of agreed facts, issues for trial, and documentary exhibits tendered during the trial.

[30] Order 55 r. 4(1)(h) of the ROC 2012 requires the appellant's solicitor to prepare and file requisite number of copies of the record of appeal in the High Court and the record shall contain copies of all such documentary exhibits and other documents the parties shall consider relevant for the purposes of the appeal.

[31] It is clear that the obligation is on the appellant's solicitor to ensure that his record of appeal shall contain documentary exhibits and all other documents that both parties shall consider relevant for the purposes of the appeal.

[32] The reason for not including the plaintiff's opening statement, the statement of agreed facts, issues for trial, and documentary exhibits tendered during the trial in the record of appeal was not offered by the appellant's solicitor.

[33] However, based on the chronology of events, it is believed that the record of appeal was already filed on 11 September 2023 when the respondent's second letter dated 12 September 2023 specifying the documents that ought to be included was served on the appellant's solicitor. It is the obligation of the appellant's solicitor to ensure that all documents the parties shall consider relevant for the purposes of appeal be included in the record of appeal. There is no action taken by the appellant's solicitor to regularise the record of appeal. As such the said record of appeal is an incomplete record being filed in court for purpose to support the appellant's appeal.

[34] Issue (iii): That the ROA was not served on the respondent within the time limit for the serving of a copy of such record of appeal on the respondent.

[35] The respondent's solicitor submit that the appellant's solicitor had failed to serve the record of appeal within the time limit for filing and serving the record of appeal on them. According to O. 55 r. 4(8) of the ROC 2012, the appellant's solicitor shall within the time limit for the filing of a record of appeal serve each respondent with a copy of such record of appeal.

[36] Based on the record in the E-Kehakiman Sabah & Sarawak (Judiciary Community System) (CMS-C), the notice of appeal was filed by the appellant's solicitor on 7 August 2023. Pursuant to O. 55 r. 4(1) of the ROC 2012, the appellant shall within one month from the date of filing of the notice of appeal prepare and file the requisite number of copies of the record of appeal in the High Court and shall contain copies of the documents as listed in O. 55 r. 4(1), (a) to (h) of the ROC 2012.

[37] Reading together O. 55 r. 4(1) and r. 4(8) of the ROC 2012, therefore, it is mandatory on the appellant's solicitor to serve the respondent's solicitor with a copy of the record of appeal containing copies of the documents as listed in O. 55 r. 4(1)(a) to (h) of the ROC 2012 latest by 6 September 2023 (within one month after filing of notice of appeal).

[38] The appellant's solicitor argued that the record of appeal was filed on 30 August 2023 and it was filed within the time limit for filing the said record of appeal. However, the appellant's solicitor admits that the record of appeal was only served on the respondent's solicitor on 11 September 2023.

[39] I wish to again refer to O. 55 r. 4(8) where it says:

> (8) The appellant **shall within the time limited for the filing of a record of appeal serve** each respondent with a copy of such record of appeal. (emphasis added)

[40] In this matter, the time limit for filing of a record of appeal is within one month after filing the notice of appeal (7 August 2023), that is on or before 6 September 2023. Thus, the appellant's solicitor shall serve the copy of such record of appeal on the respondent's solicitor latest by 6 September 2023. I found that there was a delay of approximately five days in serving the record of appeal on the respondent's solicitor. It is mandatory for the appellant's solicitor to comply strictly with the time frame prescribed under O. 55 r. 4(1) and r. 4(8) of the ROC, respectively.

[41] The respondent's solicitor referred to a case of *Tan Chai Huat v. Yap Tian Leong* [2018] CLJU 423; [2018] 1 LNS 423; [2018] MLRHU 310. The court in that case held that the timeline specified under O. 55 r. 4(1) and r. 4(8) of the ROC 2012 is a mandatory provision that must be adhered to.

[42] The court in the case of *Tang Hooi Kheng v. Titular Roman Catholic Bishop Of Penang* [2018] CLJU 233; [2018] 1 LNS 233; [2018] MLRHU 183; [2018] MLJU 268 the record of appeal was filed by the appellant's solicitor

without submitting to the respondent's solicitor the draft index of the record of appeal for approval before the filing of the record of appeal. The respondent therein objected to the record of appeal, contending that it was filed and served out of time.

[43] As decided in the case of *Cangkat Jering Sdn Bhd & Satu Lagi lwn. Normayati Alias & Satu Lagi* [2003] 2 CLJ 260; [2003] 2 MLJ 545, the High Court states that the memorandum of appeal was filed but not served within the prescribed period as required by O. 55 r. 4(3). The court emphasised that the absence of the notes of evidence and/or grounds of judgment is not a valid ground for not complying with the rule to file and serve the records of appeal within the prescribed time limit (proviso to r. 4(1)).

[44] In *Maranatha Tours & Travel Sdn Bhd v. Ampang Specialist Centre Sdn Bhd* [1997] CLJU 335; [1997] 1 LNS 335; [1997] MLJU 181, where it was held that the duty to prepare a proper record of appeal lay with the appellant, the appellant could not blame the other party if he himself did not have the sealed judgment and order of the court. The statutory requirements are mandatory and non-compliance would render the dismissal of the appeal.

[45] Though there was a delay on the part of the appellant's solicitor, there was no effort to apply for any extension/abridgment of time to serve the record of appeal on the respondent's solicitor. No application was filed for an extension of time to serve the record of appeal. Therefore, the record of appeal that was served on the respondent's solicitor was served out of the time prescribed for the service and cannot be allowed to be used for the purposes of the appellant's appeal.

[46] In the case of *Tang Hooi Kheng v. Titular Roman Catholic Bishop Of Penang* (*supra*), His Lordship decides that where the appellant failed to make an application for an extension of time with detailed, explanation on the reasons for the late filing of the record of appeal and supplemental record of appeal, it is a fatal procedural infirmity that forfeited the ability of the court exercising appellate jurisdiction whether to invoke its discretion to excuse the appellant for the non-compliance based on cogent reasons that are brought forth by him following the Federal Court's case of *National Union Of Bank Employees v. Director General Of Trade Unions & Anor* [2013] 7 CLJ 957; [2013] 5 AMR 729.

[47] It is my considered view that by virtue of the word "shall", it is mandatory upon the appellant's solicitor to strictly adhere to the requirements of O. 55 of the ROC 2012, in particular r. 4(1) and r. 4(8). Any non-compliance of the said provision by the appellant's solicitor is fatal to their appeal.

Application Of Order 1A Of The ROC 2012

[48] The appellant's solicitor did not urge the court to invoke its discretionary power under this O. 1A of the ROC 2012. I have considered the provision of O. 1A of the ROC 2012 to determine whether such provision could be invoked to cure any non-compliance by the appellant's solicitor.

[49] It was submitted by the solicitor for the respondent that O. 1A of the ROC 2012 cannot be invoked by the appellant's solicitor. Quoting the decision in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149, where His Lordship Zaki Azmi CJ at para [46] states that:

> [46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules.

[50] Order 1A of the ROC 2012 is reproduced as below:

> Regard shall be to justice (O. 1A)
>
> In administering this Rules, the Court or a Judge shall have regards to the overriding interest of justice and not only to the technical non-compliance with these Rules.

[51] However, it was held by the Federal Court in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail* (*supra*) that O. 1A cannot be invoked when a party intentionally disregards in complying with the Rules. This is not a case of an accidental omission or oversight by a party where the technical non-compliance of the rule may be remedied.

[52] Failure on the part of the appellant's solicitor in this appeal to comply with O. 55 r. 4 of the ROC 2012 is not an accidental omission or oversight by the appellant's solicitor. It was intentionally disregarded by the appellant's solicitor despite the objection raised by the respondent's solicitor. This non-compliance cannot be remedied as it does not fall within the provision of O. 1A of the ROC 2012. Order 1A cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules.

Conclusion

[53] On the reasons stated above, I had allowed the preliminary objection by the respondent's solicitor. The appellant's appeal was struck out with no order as to costs.